

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

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In re: )  
 ) Case No. 08-35653 (KRH)  
CIRCUIT CITY STORES, INC., et al., )  
 ) *Chapter 11*  
Debtors. )  
 ) Jointly Administered  
----- )

**MOTION OF MINER FLEET MANAGEMENT GROUP, LTD. FOR LEAVE  
TO FILE LATE ADMINISTRATIVE CLAIM**

COMES NOW Miner Fleet Management Group, Ltd., (“Miner” or the “Movant”) a creditor in the above-captioned cases, through its undersigned counsel, hereby files its Motion for Leave to File Late Administrative Claim (the “Motion”), and respectfully states as follows:

**I.**

**JURISDICTION**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Miner seeks relief pursuant to Rules 3003(c)(3) and 9006(b)(1) of the Federal Rules of Bankruptcy Procedure.

**II.**

**BACKGROUND**

2. On November 10, 2008 (the “Petition Date”), the above-captioned debtor and debtor-in-possession (collectively, the “Debtor”) filed a petition for reorganization under Chapter 11 of the Bankruptcy Code and continued the management of its business and properties as debtor-in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On May 1, 2009 the Debtor filed its Motion for Order Pursuant to Bankruptcy Code Sections 105 and 503, and Bankruptcy Rules 2002 and 9007 (I) Setting Administrative Bar Date and Procedures for Filing and Objecting to Administrative Expense Requests and (II) Approving Form and Manner of Notice Thereof (Docket No. 3247)(the “Debtor’s Bar Date Motion”).

4. The Debtor’s Bar Date Motion was granted by the Court on May 14, 2009 (Docket No. 3354) and the Administrative bar date was set as June 30, 2009 (the “Order”).

5. From the commencement of this Chapter 11 case through the cessation of the Debtor’s operations, Miner serviced and supplied the goods necessary for the operation and upkeep of the Debtor’s docks, doors, conveyors, forklifts, stockpickers and pallet jacks.

### **III.**

#### **MOTION FOR LEAVE TO FILE LATE CLAIM**

7. By this Motion, Movant request that this Court enter an order allowing Miner to file a late administrative claim in the amount of \$19,348.89 pursuant to §503(b)(1)(A) of the Bankruptcy Code for the full value of goods and services provided to the Debtor in the ordinary course of its business after the Petition Date.

8. Section 503(a) of the Bankruptcy Code provides that “[a]n entity may timely file a request for payment of an administrative expense, or may tardily files such request if permitted by the court for cause.” The Court may “allow the late filing of [a] claim after [the] bar date has expired if the claimant’s failure was [the] result of *excusable neglect*.” *In re Enron Corp.* 298 B.R. 513, 521 (S.D.N.Y. 2003)(emphasis added).

9. The Supreme Court, in *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd.*, sets out four factors that the Court must consider in determining whether the neglect at issue will

be excusable. 507 U.S. 380, 395 (1993). These include (i) “the danger of prejudice to the debtor, [(ii)] the length of the delay and its potential impact on judicial proceedings, [(iii)] the reason for the delay, including whether it was within the reasonable control of the movant, and [(iv)] whether the movant acted in good faith.” *Pioneer*, 507 U.S. at 395. “Not all factors need to favor the [the] moving creditor to warrant acceptance of [the] creditor’s late-filed proof of claim on [the] ‘excusable neglect’ theory.” *Enron*, 298 B.R. at 525. The four-factor test has a “necessarily elastic quality,” requiring the Court to look to “the totality of the circumstances.” *In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998); *In re Kmart Corp.*, 381 F.3d 709, 714 (7th Cir. 2004)(“court may consider ‘all relevant circumstances’ in its excusable neglect analysis”).

10. For the first factor, danger of prejudice, the Court must consider the impact of the relief requested on (i) the debtor in administering its bankruptcy in a timely fashion and (ii) on the creditors’ interest in the finality of the calculation of their claims. *In re Drexel Burnham Lambert Group, Inc.*, 146 B.R. 84, 88 (Bankr. S.D.N.Y. 1992)(bar dates are imposed “so that the bankruptcy case can be administered”); *In re JWP Information Services, Inc.*, 231 B.R. 209, 213 (Bankr. S.D.N.Y. 1999). Miner’s late filed claim totals \$19,348.89, a relatively small amount when viewed in the context of the estate’s total assets and liabilities.<sup>1</sup> The length of delay here was 61 days, a nominal amount of time. This minimal claim and short delay in filing should not delay the administration of the bankruptcy case or have a prejudicial impact on other creditors.

11. Courts have interpreted the *Pioneer* decision to give particular weight to the third factor—which of the parties bears the fault for the delay. *U.S. v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004)(“perhaps the most important single factor”); *Graphic Communications Int’l Union v. Quebecor Printing Providence, Inc.* 270 F.3d 1, 5 (1st Cir. 2001)(“greatest import”);

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<sup>1</sup> See invoices attached as Exhibit A.

*Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)(“greatest import”); *In re Kmart Corp.*, 381 F.3d 709, 715 (7th Cir. 2004)(third fact is “immensely persuasive”). Throughout the course of the bankruptcy, Miner continued to provide necessary goods and services to the Debtor. Typically, at the end of a billing cycle Miner would forward a post-petition invoice to the Debtor, the Debtor would then contact Miner to discuss any questions or issues regarding the post-petition invoice and once the questions and issues were resolved the Debtor would pay the amount due. Throughout 2009, the Debtor has continued to reinforce this protocol by making at least one payment per month to Miner for goods and services provided post-petition. In fact, the Debtor made a \$127,828.54 payment on or about January 5, 2009, a \$195,597.73 payment on or about January 14, 2009, a \$22,925.18 payment on or about January 22, 2009, a \$75,333.19 and a \$161,420.82 payment on or about February 18, 2009, a \$31,891.76 payment on or about March 9, 2009, a \$20,851.33 payment on or about April 10, 2009, and a \$6,608.67 payment on or about May 4, 2009.<sup>2</sup>

12. In the customary manner, Miner contacted the Debtor on or around April 8, 2009, regarding a small number of outstanding post-petition invoices totaling less than [\$30,000] (the “Outstanding Balance”). The Debtor responded in the normal fashion and a dialogue concerning the Outstanding Balance commenced.<sup>3</sup> During the course of these exchanges, the Debtor gave no indications to Miner that they would not be paid in a manner consistent with the historical post-petition practices of the parties. While the Debtor’s responses to Miner’s persistent communications may have become less frequent in May 2009, the Debtor’s conduct reinforced Miner’s reasonable belief that the Outstanding Balance would be paid in the ordinary course of business. In fact, the Debtor paid a large portion of the Outstanding Balance on or about May 4,

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<sup>2</sup> See Summary of Payments attached as Exhibit B.

<sup>3</sup> True and correct copies of the communications are attached as Exhibit C.

2009, and as late a May 14, 2009 (*the same date the Order was signed by the Court*) representatives of the Debtor ensured Miner that they would be paid in the normal course of business.<sup>4</sup>

13. The Debtor's constant assurances that the Outstanding Balance would be paid and the Debtor's consistent practice of paying Miner's post-petition invoices induced Miner into the justifiable belief that they would be paid in due course without the Court involvement. At no time did the Debtor's representatives advise Miner that they would not be paid and that Miner needed to file an administrative claim in order to insure that its post-petition claims might be paid.

14. Miner has acted in good faith in filing this Motion and in conducting business with the Debtor. There are no facts to suggest that Miner has acted in bad faith at any time in the instant case.

15. As evidenced by the Motion, Miner provided goods and services to the Debtor valued at \$19,348.89, which were actual and necessary and the Debtor received the benefit of the goods and services after the Petition Date. Accordingly, Miner is entitled to an allowed administrative claim in the amount of \$19,348.89 pursuant to §503(b)(1)(A) of the Bankruptcy Code. Furthermore, Section 503(a) of the Bankruptcy Code provides that "[a]n entity may timely file a request for payment of an administrative expense, or may tardily files such request if permitted by the court *for cause*." (emphasis added). Here cause exists to allow Miner leave to file a late administrative claim as the Movant's delay in filing was wholly caused by the affirmative actions and statements of the Debtor, reasonably relied upon by Miner.

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<sup>4</sup> See email from Kelly Silva, Accounting Manager Circuit City Wind Down Team, dated May 14, 2009 attached as Exhibit D. Please note that the invoices displayed in the email constitute the Outstanding Balance less the \$6,608.67 payment made on or about May 4, 2009.

**IV.**

**WAIVER OF MEMORANDUM OF LAW**

16. Pursuant to Local Bankruptcy Rule 9013-1(G), and because all applicable authority is set forth in this motion, Miner requests that the requirement that all motions be accompanied by a separate memorandum of law be waived.

WHEREFORE, PERMISES CONSIDERED, Miner prays that this Court grant it leave to file its Administrative Claim late as thought it had been timely filed prior to the expiration of the Administrative Proof of Claim bar date in this case; and granting Miner such other and further relief, at law or in equity, to which Miner show itself justly entitled.

Dated: September 3, 2009

Respectfully Submitted,

**Miner Fleet Management Group, Ltd.**

/s/ Ronald A. Page, Jr.

By: \_\_\_\_\_  
Counsel

Ronald A. Page, Jr. (VSB No. 71343)  
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Cantor Arkema, P.C.  
1111 East Main Street, 16th Floor  
Richmond, Virginia 23219  
Telephone: (804) 644-1400

and

Raymond W. Battaglia  
Texas State Bar No. 01918055  
Robert K. ("Chip") Sugg  
Texas State Bar No. 24058296  
OPPENHEIMER, BLEND  
HARRISON & TATE, INC.  
711 Navarro, Sixth Floor  
San Antonio, TX 78205  
Telephone: (210) 224-2000  
Facsimile: (210) 224-7540

*Counsel for Miner Fleet Management Group, Ltd.*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2009, a copy of the foregoing was served on all parties via electronic means through the Court's ECF noticing system and by regular U.S. first class mail on the parties listed on the attached Service List.

/s/ Ronald A. Page, Jr.

By: \_\_\_\_\_  
Counsel

**CIRCUIT CITY STORES, INC.**  
**PRIMARY SERVICE LIST**

Robert B. Van Arsdale  
Office of the United States Trustee  
701 East Broad Street, Suite 4304  
Richmond, Virginia 23219  
Email: [Robert.B.Van.Arsdale@usdoj.gov](mailto:Robert.B.Van.Arsdale@usdoj.gov)

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Richmond, Virginia 23233

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Tavenner & Beran PLC  
20 North Eighth Street, Second Floor  
Richmond, Virginia 23219



# **Exhibit A**

	Division	CustomerNumber	InvoiceNumber	InvoiceDate	Invoice Total	Balance vs Delinquent	Date Diff	TermsCode
10	CIRCUIT CITY 11-10-08	0021304	8110916	11/24/2008	87.99	87.99	206	206 00
9	CIRCUIT CITY 11-10-08	0021304	8110897	11/24/2008	94.15	94.15	206	206 00
11	CIRCUIT CITY 11-10-08	0021304	8110917	11/24/2008	88.74	88.74	206	206 00
6	CIRCUIT CITY 11-10-08	0021304	8110918	11/24/2008	89.15	89.15	206	206 00
6	CIRCUIT CITY 11-10-08	0021304	8110835	11/24/2008	187.44	187.44	206	206 00
6	CIRCUIT CITY 11-10-08	0021304	8110896	11/24/2008	94.15	94.15	206	206 00
6	CIRCUIT CITY 11-10-08	0021304	8110881	11/24/2008	618.90	618.90	206	206 00
6	CIRCUIT CITY 11-10-08	0021304	8110733	11/21/2008	318.94	318.94	209	209 00
6	CIRCUIT CITY 11-10-08	0021304	8111443	11/28/2008	334.84	334.84	202	202 00
6	CIRCUIT CITY 11-10-08	0021304	8111442	11/28/2008	181.83	181.83	202	202 00
11	CIRCUIT CITY 11-10-08	0021304	8111451	11/28/2008	166.80	166.80	202	202 00
6	CIRCUIT CITY 11-10-08	0021304	8111032	11/25/2008	585.75	585.75	205	205 00
6	CIRCUIT CITY 11-10-08	0021304	8111142	11/26/2008	1,424.45	1,424.45	204	204 00
6	CIRCUIT CITY 11-10-08	0021304	8111141	11/28/2008	125.58	125.58	202	202 00
6	CIRCUIT CITY 11-10-08	0021304	8111437	11/28/2008	170.32	170.32	202	202 00
6	CIRCUIT CITY 11-10-08	0021304	0902434	2/10/2009	1,327.30	1,327.30	98	128 01
11	CIRCUIT CITY 11-10-08	0021304	0902691	2/16/2009	765.31	765.31	92	122 01
11	CIRCUIT CITY 11-10-08	0021304	0902682	2/16/2009	500.00	500.00	92	122 01
6	CIRCUIT CITY 11-10-08	0021304	0902775	2/18/2009	3,429.71	3,429.71	90	120 01
6	CIRCUIT CITY 11-10-08	0021304	0902839	2/20/2009	452.99	452.99	88	118 01
17	CIRCUIT CITY 11-10-08	0021304	0902455	2/11/2009	1,740.96	1,740.96	97	127 01
6	CIRCUIT CITY 11-10-08	0021304	0902676	2/16/2009	446.39	446.39	92	122 01
6	CIRCUIT CITY 11-10-08	0021304	0902586	2/12/2009	1,441.58	1,441.58	96	126 01
11	CIRCUIT CITY 11-10-08	0021304	8110601	11/20/2008	397.98	397.98	210	210 00
11	CIRCUIT CITY 11-10-08	0021304	0902940	2/20/2009	1,526.14	1,526.14	88	118 01
11	CIRCUIT CITY 11-10-08	0021304	0902879	2/20/2009	497.42	497.42	88	118 01
11	CIRCUIT CITY 11-10-08	0021304	8110584	11/20/2008	491.65	491.65	210	210 00
11	CIRCUIT CITY 11-10-08	0021304	0902875	2/20/2009	786.87	786.87	88	118 01
11	CIRCUIT CITY 11-10-08	0021304	0902876	2/20/2009	498.34	498.34	88	118 01
11	CIRCUIT CITY 11-10-08	0021304	0902877	2/20/2009	477.22	477.22	88	118 01
19					19,348.89	19,348.89		

# **Exhibit B**

**Summary of Payments**

<b><u>Check No.</u></b>	<b><u>Deposit Date</u></b>	<b><u>Amount</u></b>
4589770	1/5/2009	127,828.54
CASHIER CK	1/14/2009	195,597.73
4595507	1/22/2009	22,925.18
4600423	2/18/2009	75,333.19
4604708	2/18/2009	161,420.82
4605189	3/9/2009	31,891.76
4607290	4/10/2009	20,851.33
4607526	5/4/2009	6,608.67
GRAND TOTAL		642,457.22

# **Exhibit C**

**From:** Patrick Aelvoet

**Sent:** Wednesday, April 08, 2009 11:05 AM

**To:** 'Kelly\_Silva@circuitcity.com'

**Subject:** Miner Fleet Management

Kelly,

I have left several voice mail messages for you over the past couple of weeks. Can you please provide me a status on Miner Fleet Management's past due invoices. Thanks.

"Patrick Aelvoet" <paelvoet@minercorp.com>

04/09/2009 09:29 AM

To<Leslie\_Webb@Circuitcity.com>  
cc

SubjectRE: Accounting Contact

Les,

I have left numerous messages for Kelly and have not heard back from her. Can you provide another contact? Thanks.

"Patrick Aelvoet" <[paelvoet@minercorp.com](mailto:paelvoet@minercorp.com)>

04/13/2009 03:05 PM

To:<[Kelly\\_Silva@circuitcity.com](mailto:Kelly_Silva@circuitcity.com)>  
cc

Subject:Miner Fleet Management

Kelly,

Miner Fleet Management received a payment last week, however we show the attached invoices/statements which remain past due. Can you please let me know when we can expect payment? Thank you.



**From:** [Kelly\\_Silva@circuitcity.com](mailto:Kelly_Silva@circuitcity.com) [mailto:[Kelly\\_Silva@circuitcity.com](mailto:Kelly_Silva@circuitcity.com)]

**Sent:** Monday, April 13, 2009 2:31 PM

**To:** Patrick Aelvoet

**Subject:** Re: Miner Fleet Management

I am looking into the status of the invoices that were attached in your email and will get back to you. Thanks,

\* Please note- My email address will be changing to [Kelly\\_Silva@ccswinddown.com](mailto:Kelly_Silva@ccswinddown.com) on April 17. My new account is now active and should be used for any email correspondence immediately\*

Kelly Silva

Expense/Service/Advertising Payables Manager

Circuit City Stores, Inc.

(804) 486-3012

**From:** Patrick Aelvoet

**Sent:** Tuesday, April 21, 2009 4:54 PM

**To:** '[Kelly\\_Silva@ccswinddown.com](mailto:Kelly_Silva@ccswinddown.com)'

**Subject:** FW: Miner Fleet Management

Kelly,

Have you been able to find out anything regarding the balances which remain due to Miner Fleet?

**From:** Kelly Silva [mailto:kelly\_silva@ccswinddown.com]

**Sent:** Thursday, May 14, 2009 2:56 PM

**To:** Patrick Aelvoet

**Subject:** Re: Miner Fleet Management

Hi Patrick,

We have processed the following invoices and payment should be issued by the end of the week. Please let me know if you have any remaining invoices due. Thanks.

Invoice	Date	Gross Amt
8110584	11/20/2008	491.65
8110601	11/20/2008	397.98
8110733	11/21/2008	318.94
8110835	11/24/2008	187.44
8110881	11/24/2008	618.90
8110896	11/24/2008	94.15
8110897	11/24/2008	94.15
8110916	11/24/2008	87.99
8110917	11/24/2008	88.74
8110918	11/24/2008	89.15
8111032	11/25/2008	585.75
8111142	11/26/2008	1,424.45
8111437	11/28/2008	170.32
8111441	11/28/2008	125.58
8111442	11/28/2008	181.83
8111443	11/28/2008	334.84
8111451	11/28/2008	166.80
0902434	2/10/2009	1,327.30
0902455	2/11/2009	1,740.96
0902586	2/12/2009	1,441.58
0902676	2/16/2009	446.39
0902682	2/16/2009	500.00
0902691	2/16/2009	765.31
0902775	2/18/2009	3,429.71
0902839	2/20/2009	452.99
0902875	2/20/2009	786.87
0902876	2/20/2009	498.34
0902877	2/20/2009	477.22
0902879	2/20/2009	497.42
0902940	2/20/2009	1,526.14
9020497	3/2/2009	818.31
9020498	3/2/2009	500.20
0903061	3/5/2009	500.20
0903120	3/6/2009	3,269.82
0903302	3/10/2009	1,097.00
0903303	3/10/2009	423.14
		25,957.56

**From:** Patrick Aelvoet

**Sent:** Wednesday, June 03, 2009 8:26 AM

**To:** Kelly Silva

**Subject:** RE: Miner Fleet Management

Kelly,

We still have not seen payment. Can you please provide a status?

**From:** Patrick Aelvoet

**Sent:** Thursday, June 18, 2009 10:28 AM

**To:** Kelly Silva

**Subject:** Miner Fleet Management

Kelly,

Please see the attached, which represents Miner's remaining outstanding invoices. When can we expect payment?



**From:** Patrick Aelvoet

**Sent:** Thursday, June 25, 2009 2:10 PM

**To:** 'Kelly Silva'

**Subject:** FW: Miner Fleet Management

Kelly,

We still have not rec'd payment. Can you please respond letting me know when we can expect payment?

**From:** Patrick Aelvoet

**Sent:** Thursday, July 09, 2009 5:30 PM

**To:** 'Kelly Silva'

**Subject:** FW: Miner Fleet Management

Kelly,

We still have not rec'd payment on the attached. Please respond back to let me know that you are receiving this e-mail. Thanks.

**From:** Patrick Aelvoet

**Sent:** Tuesday, July 14, 2009 9:16 AM

**To:** david\_strauss@circuitcity.com

**Subject:** FW: Miner Fleet Management

David,

Jeff Schmeck asked that I forward this e-mail to you. Miner still has about \$19k in post petition invoices which remain unpaid. Is there anything you can do to provide a status? I am not hearing anything back from the accounting department. Thanks for anything you can do.



**From:** Patrick Aelvoet

**Sent:** Thursday, July 30, 2009 6:32 PM

**To:** 'heather\_ferguson@ccswinddown.com'

**Subject:** FW: Miner Fleet Management

Heather,

I was provided your name as someone who could possibly help. I have been sending Kelly Silva e-mails, but have not heard back. Attached are post-petition invoices which remain unpaid. Can you please provide me a status? Thanks.

# **Exhibit D**

**From:** Kelly Silva [mailto:kelly\_silva@ccswinddown.com]  
**Sent:** Thursday, May 14, 2009 2:56 PM  
**To:** Patrick Aelvoet  
**Subject:** Re: Miner Fleet Management

Hi Patrick,

We have processed the following invoices and payment should be issued by the end of the week. Please let me know if you have any remaining invoices due. Thanks.

Invoice	Date	Gross Amt
8110584	11/20/2008	491.65
8110601	11/20/2008	397.98
8110733	11/21/2008	318.94
8110835	11/24/2008	187.44
8110881	11/24/2008	618.90
8110896	11/24/2008	94.15
8110897	11/24/2008	94.15
8110916	11/24/2008	87.99
8110917	11/24/2008	88.74
8110918	11/24/2008	89.15
8111032	11/25/2008	585.75
8111142	11/26/2008	1,424.45
8111437	11/28/2008	170.32
8111441	11/28/2008	125.58
8111442	11/28/2008	181.83
8111443	11/28/2008	334.84
8111451	11/28/2008	166.80
0902434	2/10/2009	1,327.30
0902455	2/11/2009	1,740.96
0902586	2/12/2009	1,441.58
0902676	2/16/2009	446.39
0902682	2/16/2009	500.00
0902691	2/16/2009	765.31
0902775	2/18/2009	3,429.71
0902839	2/20/2009	452.99
0902875	2/20/2009	786.87
0902876	2/20/2009	498.34
0902877	2/20/2009	477.22
0902879	2/20/2009	497.42
0902940	2/20/2009	1,526.14
9020497	3/2/2009	818.31
9020498	3/2/2009	500.20
0903061	3/5/2009	500.20
0903120	3/6/2009	3,269.82
0903302	3/10/2009	1,097.00
0903303	3/10/2009	423.14
		25,957.56